

September 29, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference Number: 04-0108

Conrad T. Swanson, Esquire
Carlson & Swanson, P.C.
125 South Howes, Suite 890
Fort Collins, CO 80521

Dear Mr. Swanson:

This is in response to the appeal that you filed on behalf of your client, ADH Contracting, LLC ("ADHC"). We have carefully reviewed the material from the Colorado Department of Transportation ("CDOT") as well as the information you provided and have concluded that the denial of ADHC's certification as an eligible Disadvantaged Business Enterprise (DBE) under criteria set forth in 49 CFR Part 26 ("the Regulation") is supported by substantial record evidence.

Your appeal is denied based upon our determination that substantial evidence supports CDOT's conclusion that ADHC is not an independent business as required by the Department's Regulation.

The specific reasons for the denial of your appeal include the following:

INDEPENDENCE

The Regulation §26.71(b) and (c) provides in part, that only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms. In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources. You must consider whether present or recent employer/employee relationships between the disadvantaged DBE owner and non-DBE firms compromise the independence of the potential DBE firm. You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm. In considering factors related to the independence of a potential DBE firm, you must consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

According to the record, ADHC is a truck brokering firm established in October 2003 by Ms. Annette Hersh, president, a disadvantaged individual. Ms. Hersh's income tax filings contained in the record indicate that she is the 22.5% owner of [REDACTED] ("HHT"), a firm owned by her husband, Henry G. Hersh (27.5%) and her brother-in-law Scot Hersh (50%).

During the January 20, 2004 on-site interview, Ms. Hersh stated that she subcontracts a portion of ADHC's work to [REDACTED] and several other trucking companies. According to the on-site interview report, these are verbal agreements but Ms. Hersh "has them set up to sign a contract with her stating compliance for brokering with her company." CDOT concluded that a close relationship existed between ADHC and [REDACTED] that appeared less than arms-length which compromised ADHC's ability to operate as an independent business in accordance with the Department's Regulation.

You make the following points in your May 25, 2004 rebuttal letter:

1. ADHC acts as a liaison or "middle-man" between contractors who require trucking services and trucking companies which are looking for jobs.
2. Ms. Hersh's relationship with [REDACTED] is not sufficient reason for determining that ADHC is not an independent business. ADHC does not rely upon personnel, facilities, equipment, financial and/or bonding support, or other resources provided by [REDACTED] or any other firm. ADHC has not engaged in a pattern of dealing exclusively with a prime contractor in a manner that might compromise its independence and has committed to interacting with non-DBE contractors and trucking companies in a manner that is commercially reasonable.
3. The Regulation does not prohibit familial relationships between the principal of a DBE firm and the principals of non-DBE firms. Some sections of the Regulation contemplate the involvement of non-disadvantaged family members in a DBE firm.
4. In order for ADHC to succeed, ADHC must be perceived by contractors to be capable of providing trucks in a timely manner for a competitive price. If Ms. Hersh tried to steer an excessive or inappropriate amount of business to Henry Hersh Trucking, Inc., her ability to meet the needs of the contracts expecting timely and reasonably priced trucking would be reduced. Conversely, if ADHC were to never use [REDACTED] to meet the trucking needs of contractors, it would harm its ability to provide timely and reasonably priced trucking services to contractors since [REDACTED] is a large trucking company in northern [REDACTED].

Under the Department's Regulation, the applicant firm bears the burden of demonstrating its independence from other firms. While it may be true that ADHC does not rely upon personnel, facilities, equipment, financial and/or bonding support, or other resources provided by other firms, Ms. Hersh's ability to serve ADHC and [REDACTED] would be impaired given her co-ownership of [REDACTED]. Ms. Hersh has not demonstrated how she can work in such a way that she meets the obligations of both firms simultaneously. As co-owner of [REDACTED], Ms. Hersh would presumably work in that firm's favor by directing a substantial portion of ADHC's business to [REDACTED]. It is conceivable that situations would arise in which [REDACTED] may not provide the best price or service under a particular contract or provide ADHC with a commission that would be lower than if she would have used another trucking company besides [REDACTED]. This

arrangement has the potential to limit Ms. Hersh's ability to direct ADHC and reach independent decisions regarding its operations and is prohibited under the Department's DBE Regulation.

Lastly, it appears that an affiliation may exist between ADHC and [REDACTED]. This point was not addressed by CDOT in its DBE certification denial decision and the Department will not address it here.

CDOT's conclusion that ADHC is not an independent business is supported by substantial record evidence.

OTHER ISSUES

The Regulation at 26.71§ (j) requires that in order to be viewed as controlling a firm, the disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

The on-site visit report contained in the record indicates that Ms. Hersh works 12 hours per week at [REDACTED] performing payroll. Although Ms. Hersh stated that she works 40-50 hours per week for ADHC, you indicate in your rebuttal letter:

. . . for at least the immediate future, [Ms. Hersh] will be the only person working on behalf of ADHC. ADHC's business is not a "capital intensive business." Furthermore, Ms. Hersh, as the sole person working on behalf of ADHC, can devote as much time or as little time as will be needed to develop customers and satisfy their needs. Ms. Hersh hopes that ADHC will become a full-time undertaking for her, and it may grow so that additional employees are required. Initially, however, ADHC did not require Ms. Hersh's full time efforts.

. . . Ms. Hersh continues to work at [REDACTED] only because it is unlikely that ADHC will require full-time services until it has been conducting business for some period of time. Her part-time efforts at Henry Hersh Trucking Inc. are not so significant that she would compromise, in any manner, either the independence or the viability of ADHC in order to preserve that part-time employment.

The record is unclear with respect to Ms. Hersh's actual hours devoted to each firm and whether her work for [REDACTED] impedes her ability to manage or devote sufficient time and attention to ADHC. The Department will not issue a finding in this regard since CDOT did not address Ms. Hersh overall control of her firm in its decision. However, it is important to note that this is also an area of concern.

In summary, the information provided cumulatively supports a conclusion that ADHC does not meet the criteria as required for DBE certification under 49 CFR Part 26. The company is, therefore, ineligible to participate as a DBE on CDOT's Federal financially assisted projects. This determination is administratively final as of the date of this correspondence.

Sincerely,

Original Signed By

Joseph E. Austin, Chief
External Policy and Program Development Division
Departmental Office of Civil Rights

cc: CDOT